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## Race, reconciliation and justice in Australia

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# Race, Reconciliation and Justice in Australia: From Denial to Acknowledgment

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*Abstract:* The harm perpetrated by the state of Australia against its Indigenous peoples has been structured, prolonged, and driven by race. In this paper, we conceptualize this harm and how it has been denied (and particularly how race has affected this harm and its denial). Although transitional justice literature has not traditionally been applied to an established democracy like Australia, we demonstrate why it is appropriate to apply transitional justice practices to the relationship between the Australian state and Indigenous peoples, and what transitional justice practices might provide in the Australian case. In particular, we argue that a transitional justice framework may allow Indigenous voices to name the harm inflicted on them, and position the state as acknowledging the harm that they have perpetrated – bringing a fundamentally new relationship between the state and Indigenous peoples.

*Keywords:* Indigenous Peoples, Transitional Justice, Reconciliation, Harm

Since the arrival of the British to what is now Australia in 1788, a great deal of harm has been perpetrated against Australia's Indigenous peoples. Race has been a major driver of this harm: it has been used to justify the infliction of harm (for example, the removal of Indigenous children from their families on the basis of their race), and it has been used to structure the relationship between the Australian state and Indigenous peoples in a way that has allowed harm to be perpetrated (for example, the insertion of the Race power in the Australian Constitution in 1901). Not only has this harm occurred, but it has been repeatedly denied by the Australian state. In this article, we examine the infliction of harm and its denial by the state of Australia. We argue that the prolonged and structured violence perpetrated by the state against Indigenous peoples requires a transitional justice framework to facilitate healing. The existing transitional justice literature has only recently turned to the Australian context, in part because an established democracy like Australia has not been traditionally seen as a 'paradigmatic' case for transitional justice mechanisms. In order to establish why transitional justice might be appropriate in the Australian context, we commence this article by offering a novel understanding of how Australian political history has been constructed around the denial of racialized harm. We set out three key phases of the harm that has occurred, its denial, and its connection to race: Australia's progression from colony to nation and its relationship with the colonizing power; Australia's modern history of state institutions refusing to acknowledge the type and scale of harms; and the reconciliation movement as a political gesture rather than a healing move.

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In the next part of the article, we examine why and how a transitional justice framework for Australia could permit greater realization of justice for Indigenous peoples. Numerous authors have pointed out the challenges of transitional justice in settler-colonial societies (see Nagy [2012], Henry [2015], Edmonds [2015]). We acknowledge these problems, but argue that transitional justice has several characteristics which might make it useful in the Australian context. Unlike the Australian reconciliation policy, transitional justice places the state properly at the centre of any question of redress, and allows race to have a place in the construction of what healing might look like. These aspects are integral to the idea that transitional justice might allow a more fulsome healing to occur. We further argue that, in order to avoid the possible problems of transitional justice, such a framework should have at least two features: it must be structured with Indigenous voices naming the harm they have survived and the healing that is appropriate, and it must involve a full acknowledgment of the harm by the Australian state. This paper therefore makes three contributions: it sets out a novel history of race relations in Australia and the way the Australian state has denied the harm inflicted on Indigenous peoples; it offers a suggestion as to why transitional justice might be appropriate in Australia; and it makes normative proposals for how transitional justice should operate in Australia.

We write, together, as a form of a dialogue between Indigenous and non-Indigenous legal scholars. We have written previously about the utility of our coming together in this way, to provide a viewpoint from both an Indigenous and non-Indigenous perspective (McMillan and Rigney, 2016). This article is an example of how we consider reconciliation dialogue can be optimally undertaken: with both Indigenous and non-Indigenous people talking openly, listening properly, and taking responsibility for their heritages and their current and future engagements. It is important for non-Indigenous peoples to have solidarity with Indigenous justice claims against the state, and also to take responsibility for their roles and position in the ongoing violence of settler-colonialism. However, this article focuses on the relationship between Indigenous Australians and the state of Australia, as the entity that has been responsible for much harm and that should now be responsible for acknowledging that harm and being involved with healing mechanisms.

### **Transitional Justice: A Framework For Understanding Race and Historic Injustices in Established Democracies?**

Transitional justice can be defined as ‘the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to achieve accountability, serve justice and achieve reconciliation’ (United Nations, 2004). Applying transitional justice mechanisms in Australia – an established democracy with a Constitution and stable governance, which has not experienced declared war on its territory – may appear contentious. The

‘transition’ of transitional justice has typically referred to one of two ‘paradigmatic’ cases: societies emerging from conflict, or moving from an old (authoritarian) regime to a new (democratic) one. Traditionally, transitional justice has been conceived of as involving a moment of rupture in a society (see Balint, Evans and McMillan [2014]). Transitional justice is ‘intimately tied with particular conceptions of democracy’ (Ní Aoláin and Campbell 2005, 173). Established democracies have not traditionally been seen as requiring the mechanisms of transitional justice.

Yet democratic states can still perpetrate harm on a segment of their populations. As Ní Aoláin and Campbell point out, there can be cases of ‘conflicted democracies’, where there is ‘prolonged, structured, communal, political violence, even where the political structures could broadly be considered “democratic”’ (Ní Aoláin and Campbell 2005, 174). We argue that Australia is an example of a democratic state, whose white structures of governance have inflicted such ‘prolonged, structured, communal, political violence’ upon Indigenous Australians. A ‘conflicted democracy’ has both a ‘deep seated and sharp division in the body politic, whether on ethnic, racial, religious, class, or ideological grounds’, and actual or threatened ‘significant political violence’ (ibid, 176). We argue that both these conditions are met in the context of the Australian state and Indigenous Australians.

In response to this acknowledgement that established democracies may inflict harm upon their population, there has been some recent work that has considered the utility of employing transitional justice mechanisms in established democracies (Winter 2014). As Winter notes, while cases of paradigmatic change ‘makes it easier to distinguish transitional justice institutions [...] the context of established democracies requires more precision’ (Winter 2013, 231). In such a context, human rights violations might be considered ‘systemic’ (and therefore in need of a response) when such wrongdoing ‘is embedded in state policy’ (ibid). In these cases, state wrongdoing is not ‘deviant’ or in breach of the accepted standards, but rather ‘the regime of citizen-state relations is itself perverse’ (ibid). Winter’s analysis centers on the legitimacy of the state, and he argues that transitional justice can operate to ‘resolve the burden’ which rests upon the legitimacy of the state as a result of the state’s wrongdoing. In this article, we are less concerned with the state’s legitimacy, than with the ongoing relationship between the state and Indigenous peoples. Nonetheless, Winter’s work is important for conceptualizing the possibility of using transitional justice to ensure redress in cases of systemic harm committed by an established, democratic state.

Recent literature applying transitional justice to the relationship of a settler-colonial state and an Indigenous population has primarily focused on the Canadian experience. This literature has emerged particularly from Canada’s recent Indian Residential Schools Truth and Reconciliation Commission (see Nagy [2012]; Nagy [2013]; James [2012]). Australia and Canada share many

similarities: both are former British colonies and are now settler-colonies with an Indigenous population. However, there are also significant differences regarding how the state interacts with Indigenous peoples. In particular, Canada has both a treaty framework and a human rights framework to regulate this relationship, while Australia has neither of these. This difference is due, in part, to the different histories of Canada and Australia, and particularly their different historical relationships with Great Britain: the British entered into treaties with Indigenous peoples in Canada, but in Australia they invoked the doctrine of *terra nullius*, or ‘land belonging to no-one’. This allowed the British to claim the territory, as it was considered to exist without a state exercising sovereignty over it. The presence or absence of treaty and human rights frameworks is particularly relevant to state recognition of Indigenous people, their sovereignty, and the potential for the state to inflict harm. Treaties suggest a mutual recognition between the state and Indigenous peoples, and a human rights framework acknowledges that the state may wrongly engage in human rights violations against Indigenous people, and seeks to remedy any such violations. The absence of these two frameworks in Australia means that the relationship between the state and Indigenous peoples is profoundly different from the Canadian case.<sup>i</sup> For Australia’s Indigenous people, the United Nations *Declaration on the Rights of Indigenous Peoples* is the main vehicle to regulate the relationship between Indigenous people and the state (Davis 2008, 470), and in the absence of domestic provisions, Australia’s Indigenous peoples are compelled to use this international framework.<sup>ii</sup> In this way, the emerging transitional justice literature on Canada is helpful for the Australian context, but only in part. The Australian story is sufficiently different to require its own conceptualizations. However, the application of transitional justice to the relationship between the Australian state and Indigenous Australians is a new field of scholarship, emerging only very recently (Balint, Evans and McMillan [2014]; Henry [2015]). We seek to build upon this literature by reiterating the importance of black voices in building a transitional justice framework for Australia, and the importance of race in conversations of harm and healing.

However, transitional justice can be undertaken in ways that can undermine Indigenous justice claims. With its emphasis on the state, transitional justice can operate to silence or deny the justice claims of minorities and ‘peoples’ who make claims against the state. The emphasis of transitional justice on state-building has been matched with an ‘excessive individualism and false universalism, which may at times mask or obscure power relations within that discourse and which dominates ‘the imaginative space of emancipation’ (Henry 2015, 207). This individualism has been reflected in the frequent focus of transitional justice on individual restoration, rather than on forms of Indigenous healing (Nagy 2012, 60), which tend to be more communal and political. In these ways, transitional justice is not *always* or *necessarily* able to bring improved justice outcomes for Indigenous peoples.

These potential failures must be overcome. In this article, we suggest ways in which transitional justice might be structured, to overcome some of these issues.

## **Identifying the Harm Done to Indigenous Populations in Australia**

In this section of this article, we outline the key moments of harm in the Australian context, and demonstrate the ongoing denial of harm that has occurred. This can be conceptualized as falling into three phases: first, the emergence of Australia as a nation-state and the denial of conflict ('it is not us'); second, the unwillingness of the state to account for the type and scale of harm inflicted on Indigenous peoples ('that which cannot be named'); and third, reconciliation as a political discourse rather than one of justice. At each point, we attempt to acknowledge the complexity of the Australian situation, with its multiple and overlapping spheres of responsibility for harm – in particular, the relationship between the United Kingdom of Great Britain and Northern Ireland and the state of Australia. We do this by tracking the shifts in the entity that perpetrated the harms against Indigenous peoples in Australia. These timelines are not clearly demarcated: they circle in and around each other, and together constitute a history of Australia's race relations.

In setting out the three phases of harm and its denial in Australia, we demonstrate how race has been utilized by white structures of state to perpetrate – and then deny – the harm. Race has been built into the institutions and apparatuses of the Australian state. It was not until 1967 that the Australian Constitution was amended to allow Indigenous people to be counted in the population of Australia, and as we explain below, race has been placed into the Australian Constitution. There have only ever been eight members of federal parliament who were or are Indigenous, and of that number, four are incumbent at the time of writing this article in 2017. It is these white institutions of state that have engaged in a steadfast denial of the conflicts with Indigenous Australians and the harm inflicted on them.

### **1) 'It is not us': the denial of conflict**

The territory now known as Australia has over two hundred separate Indigenous communities, who lived with the land prior to British arrival, and have never ceded their sovereignty of this land. From the start of British settlement in 1788, 'prolonged, structured, communal, political violence' has been inflicted on Indigenous Australians. This has included the use of force, armed hostilities, massacres, the removal of children, and dispossession of land (see Creative Spirits [2016]; Reynolds [2001]). However, the emergence of the Australian state independent from the colonial power, Great Britain, has obscured which entity must be accountable for past harms to Indigenous populations. At different points since the arrival of the British settlers, Australia has been a colonial outpost, a

collection of colonies, a federation of states and territories, a dominion, and a member of the Realm of the Commonwealth with a British head of state. This multitude of political configurations, along with a complicated relationship with the colonial power, has permitted a space of plausible deniability for taking responsibility for the harms committed against Indigenous people. The state of Australia can deny their past responsibility, and at the same moment, Great Britain can deny any ongoing responsibility.

Race has been critical to the formation of the Australian nation-state, and particularly the transition of Australia from colony to nation (Moreton-Robinson, 86-7). It was through ‘the intersection between race and property’ that the legal fiction of *terra nullius* was permitted to be invoked by the British Crown, in order to justify British settlement (ibid). Race, therefore, has always been integral to the encounters that have occurred between Indigenous peoples and settlers – and integral to the harms that have been inflicted on Indigenous peoples. The incorrect application of *terra nullius* permitted the acquisition of Indigenous lands for the British, and ensured that the Australian legal system was established upon incorrect assumptions about Australia’s Indigenous peoples. One justification for *terra nullius* was that Indigenous peoples were technically not people of sufficient evolution on a scale of civilization (*Mabo v Queensland (No 2)*), and therefore it was not possible to be in conflict with them. These incorrect assumptions continued for nearly two hundred years: it was only in 1992 that the doctrine of *terra nullius* was recognized by the Australian High Court as a legal fiction (*Mabo v Queensland (No 2)*). While this finding meant that there was no legal justification for the removal of land, by 1992 settler-colonialism was too advanced to fully return the lands to their traditional owners, and a complicated system of Native Title law emerged in Australia. This application of *terra nullius* was therefore integral to the claim made by the state of Australia, that it was not responsible for the harms done by the colonial state to the Indigenous peoples.

Prior to the federation of Australia, the colonies retained the sovereign powers to deal with Aborigines. This structure was facilitated by Great Britain, which allowed these self-governing powers to the individual colonies. During the 1880s and 1890s, each colony implemented their own versions of apartheid legislation that sought to minimize or ‘breed’ out Aborigines – thereby using race to justify the infliction of harm (see, e.g. *Aboriginal Protection Act 1869* (Vic)). The stated objective of the colonies in denying the Commonwealth the capacity to legislate for Aborigines was on the basis that it was their function to ‘smooth the pillow of the dying breed’ (Human Rights and Equal Opportunity Commission 1997). These policies were intended to ensure the demise of the Indigenous populations in Australia (ibid).

During the negotiations between the colonies and Great Britain to create the federation of Australia in 1901, Aboriginal peoples were denied a place within the new federal entity. Instead, the ‘race power’ was drafted to specifically ensure that the federation of Australia would be denied the capacity to legislate for Aborigines (*Constitution of Australia*, s 51 (xxvi)). The ‘race power’ originally read that the federal parliament possessed the ability to make laws with respect to ‘the people of any race, *other than the aboriginal race in any State*, for whom it is deemed necessary to make special laws’ (ibid). Because of the structure of the Australian *Constitution*, which vests power in the states of Australia to make law in instances where there is no explicit federal power to do so, the capacity to legislate with respect to Aboriginal people remained with the states of Australia. In this way, race would be used to structure the relationship of the state to a segment of its population – its Indigenous peoples – so as to deny federal responsibility and vest that responsibility with the newly formed states. The ‘race power’ would subsequently be amended in 1967 to permit the federal government to draft ‘special laws’ for Indigenous people (see McMillan and Clark [2015]). However, this change served to further embed race into the *Constitution* of the state of Australia, and thus into how the state interacts with Indigenous peoples.

Australia’s progression to nation-state was complex, and it is not obvious when Australia officially became a nation-state. Between 1901 and 1926 the Commonwealth of Australia was a federal framework for the states. In 1926 with the enactment of the Balfour Declarations, Australia became a dominion within the Empire. In 1931 the UK parliament enacted the Statute of Westminster, which declared the dominions to be ‘autonomous Communities within the British Empire,’ equal in status and ‘united one to another by a common allegiance to the Crown’ (Bennett 2004). In 1942, the Statute of Westminster was adopted by Australia and back-dated to 3 September 1939. However Australia was not legally independent from the UK until 1986, when the *Australia Acts* cut off any appeals from Australian courts to the Privy Council. Australian citizens were also British Subjects under Australian law until 1987 (*Australian Citizenship Amendment Act* 1984). Australia remains a member of the Realm of the Commonwealth, and today still retains the Monarch of the UK as the Australian Head of State. British involvement in the ‘internal’ affairs of Australia has continued.

This relationship between the UK and Australia has meant that both entities can plausibly deny their involvement in, or responsibility for, the harms that were committed. White Australian institutions have been able to argue that it was the colonies and ultimately the colonial power that was responsible, while the UK rarely features in any discussion about Indigenous and non-Indigenous relationships in Australia, and is reticent to engage in any such conversations (Lawson 2014). As will be demonstrated in the next section, the Australian state has continued to actively deny the harms that occurred and their continued ramifications on Indigenous peoples today.



## 2) That which cannot be named: the denial of genocide

The space for denial that has been permitted by Australia's complex history of nationhood and its relationship with the colonial power, has been opened further through a steadfast refusal to name the degree and type of harm inflicted. In particular, Australian institutions of state have refused to name the harm as genocide. Genocide – a term linked with state based or state sanctioned atrocities – has been debated ferociously in Australia since the 1970s (Tatz 2011). Under the *Convention on the Prevention and Punishment of the Crime of Genocide* (1949), 'genocide' is defined as undertaking particular acts, 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'. These acts include killing and 'forcibly transferring children of the group to another group'. However, it was Australia's ratification of this Convention in 1949, which first forewarns of the difficulties of the concept to be applied in Australia. During the parliamentary debates at this time, several members of parliament stated that genocide as an 'act of state' would be unimaginable to occur or apply in the Australian context (see Tatz [2011], who makes reference to two parliamentarians speaking in the Commonwealth Parliament in 1949).

Genocide has continued to be denied in the Australian context. Official mechanisms of state that have tried to raise the issue of genocide against the Indigenous populations have been discouraged. To the extent that such mechanisms have occurred at all, they have been piecemeal and limited. For example, legal proceedings and processes have been unwilling to describe any such instances of harm as genocide (see *Kruger v Commonwealth*). During the twentieth century, there were 118 government investigations into Indigenous Affairs (Tatz 1998, 2). Of these, the most 'powerful and critical' investigation was the National Inquiry into the 'Separation of Aboriginal and Torres Strait Islander Children from Their Families' (Ibid). As will be demonstrated below, however, whilst this Inquiry might have been 'the most critical', it still failed to adequately name the harm done – and this failure actually further facilitated the space for denial.

This Inquiry into the 'Stolen Generations' was established in 1995. The report of the Inquiry – entitled *Bringing Them Home* – was tabled in the Australian parliament in 1997 (Human Rights and Equal Opportunity Commission 1997). This report examined the question of whether the removals of children amounted to genocide, and found that the policy of forcible removal of Indigenous children 'could properly be labelled 'genocidal' in breach of binding international law from at least 11 December 1946' (ibid, 239). This declaration is an important acknowledgement of the harm caused by policy and practice of removing children from their families. On first impression, this statement appears to recognize that this practice amounted to genocide. Certainly, this is how some scholars have read this statement (see Gunstone [2016]). However, the particular wording invoked – that the

practice *could* be labelled genocidal, rather than *is* properly labelled genocidal – in fact leaves a large degree of uncertainty and equivocation. This softer language permits a space for some to contest the idea that this practice was genocidal. This framing of the genocide issue is further complicated and made particularly egregious because the original draft of the *Bringing Them Home* report is understood to have included a particular recommendation that genocide be a finding of the Inquiry. However, this recommendation did not appear in the final report (Human Rights and Equal Opportunity Commission 1997), and instead was replaced with this more ambiguous language. What remains is not a finding of genocide having occurred, or a finding that government policy in fact amounted to genocide. Instead, this is a finding that allows some to argue that the removal of children from their families was not genocide. Indeed, this is what then occurred, including at the highest levels of the state. By not articulating the harm unequivocally as genocide (but rather as ‘could be labelled ‘genocidal’’), *Bringing Them Home* actually facilitated this denial.

Australia has actively been involved in ‘culture wars’ since the mid-1990s. The ‘culture wars’ has included debates about how history should be understood and taught, particularly the history of violence perpetrated against Indigenous peoples and whether this was genocide. Some historical accounts are being recast to genuinely reflect the magnitude of harms by the colonial apparatus against Indigenous peoples (see Reynolds [1982]; Ryan [2012], Curthoys and Docker [2001]). However, others have advocated a perspective that either denies or minimizes the harms. In particular, some have argued that the scale of harm has been exaggerated (see e.g. Windschuttle [2002]; Windschuttle [2009]). It is not only in academic argument that the harms have been denied or minimized: this has also been a hallmark of the Australian state institutions.

One example of this use of scale to deny the harm done to Indigenous peoples was the claim by the Federal Minister for Indigenous Affairs in 1996, that the Stolen Generations was not a ‘generation’ at all – because only ten per cent of children that potentially could have been removed from their families, were in fact removed (Herron 2000). This statement ignores the fact that all Aboriginal children considered to be ‘half caste’ or ‘less’ *could* be removed. Playing with numbers cannot change the genocidal intention behind the removal of children, nor the effect that has had (inter-generationally) on all Indigenous people. Being Indigenous meant that you could be taken away from your family. Indigenous people have had to live with this, as their truth, from 1886. As a result, large numbers of people could not identify as Indigenous. The trauma of this continues today. That the Federal Minister for Indigenous Affairs was able to engage so readily in this denial of harm – in his official capacity as the Minister responsible for interactions between Indigenous peoples and the state – demonstrates the connections between the state, and the active denial of harm and responsibility for harm done by the state to Indigenous peoples.

The *Bringing Them Home* report made several recommendations that can be understood as further transitional justice mechanisms: apologies, the provision of reparations, and self-determination. The report recommended that all Australian Parliaments ‘officially acknowledge’ previous ‘laws, policies and practices’ of removal, and that they ‘negotiate with the Aboriginal and Torres Strait Islander Commission a form of words for official apologies’ (Human Rights and Equal Opportunity Commission 1997, recommendation 5a). From this, two things are particularly clear: first, that acknowledgement of harm is required, and second, that it is for Indigenous peoples to name the harm that occurred and the healing that is acceptable to them (as we discuss further, below). However, it was not for another decade that the federal Australian parliament undertook this apology. In the intervening years, Australia continued to deny the scale and type of harm – as well as denying Indigenous self-determination and sovereignty. Even more egregiously, this denial was conducted under the banner of ‘reconciliation’. The next section of this paper examines how the state of Australia has engaged in ‘reconciliation’ as a political discourse rather than a justice discourse.<sup>iii</sup>

### **3) Reconciliation as a political discourse of private relationships**

To the degree that the Australian state has engaged in questions of harm and healing, it has done so through a model of ‘reconciliation’. This policy has lacked definitional clarity (see Short [2008], 39-41). However, the Australian government has defined reconciliation as being ‘about unity and respect between Aboriginal and Torres Strait Islanders and non-Indigenous Australians. It is about respect for Aboriginal and Torres Strait Islander heritage and valuing justice and equity for all Australians’ (Australian Government, 2015). As a policy of the Australian government, ‘reconciliation’ is forward-looking, does not adequately acknowledge the harms of the state, and does not allow the capacity for Indigenous peoples to seek justice through reconciliation post conflict.

The reconciliation policy commenced in 1991, with the establishment of the Council for Aboriginal Reconciliation (later Reconciliation Australia). The preamble for the *Council for Aboriginal Reconciliation Act* 1991, which established this Council, states that ‘to date, there has been no formal process of reconciliation between Aborigines and Torres Strait Islanders and other Australians’. As Henry points out, the Australian reconciliation movement is ‘premised on a vision of formal equality (‘equity for all Australians’) located within a restorative justice paradigm that seeks to unite all Australians. In this conceptualization, the state does not feature as a reconciling party but rather serves as the behind-the-scenes facilitator of reconciliation’ (Henry 2015, 204). The state *supports* reconciliation, rather than participating in it – this passive role allows the state to gain legitimacy, by making invisible the state’s role as the cause of harm to Indigenous people. Reconciliation is individualized and the emphasis is on private relationships, rather than on the state

and how the state relates to communities that it has inflicted harm upon. Ultimately, the reconciliation policy has allowed a denial of the harms perpetrated by the state, and therefore has been used to ‘bolster the legitimacy, authenticity and stability’ of the Australian state (Henry 2015). The reconciliation process is hence best understood as a stage in the colonial project rather than a genuine attempt at atonement (Short [2008]). In particular, the reconciliation policy has dismissed Indigenous claims to sovereignty and nationhood (see Short [2008]; Henry [2015]). This is a further reiteration of the denial of harm, as it does not permit a acknowledgment that cultures, ways of knowing law, and governance systems were attacked in the colonial process. It also reinforces white supremacy over territory, and ignores black understandings of the harm that was done, and what is required for healing. Reconciliation has been conducted on ‘white’ terms.

The response to the *Bringing Them Home* report is a particular example of how ‘reconciliation’ has been conducted as a politically controlled discourse, in a way that denied the justice sought by Indigenous peoples and that denied their sovereignty. Prior to the tabling of the *Bringing Them Home* report, a new conservative government headed by Prime Minister John Howard was elected in 1996. The Howard government rejected the recommendations for apology, reparations, and Indigenous rights on the basis that such actions ‘premised [reconciliation] solely on a sense of national guilt and shame’ (Howard 1997).

In 1999, Howard made a *Motion of Reconciliation* to the federal parliament. In part, this motion stated that the parliament recognizes ‘the achievements of the Australian nation’ and that it ‘recognises the importance of understanding the shared history of indigenous and non-indigenous Australians and the need to acknowledge openly the wrongs and injustices of Australia’s past’ (Howard 1999). It continued with the acknowledgement ‘that the mistreatment of many indigenous Australians over a significant period represents the most blemished chapter in our national history’ and that the parliament ‘expresses its deep and sincere regret that indigenous Australians suffered injustices under the practices of past generations, and for the hurt and trauma that many indigenous people continue to feel as a consequence of those practices’ (ibid). Finally, it ends with the statement that parliament ‘believes that we, having achieved so much as a nation, can now move forward together for the benefit of all Australians’ (ibid).

This *Motion* has been criticized for its expression of ‘regret’ rather than an apology. Further, the mention of ‘mistreatment’ in this motion significantly understates the harm inflicted on Indigenous peoples (see Gunstone [2016]) and is, clearly, a long way from an acknowledgement of genocide. Although Howard consulted with the only Indigenous member of parliament at that time, there were a great number of Indigenous people who felt that this motion was deeply insufficient.

Indigenous conceptions of harm and healing had not been prioritized. Finally, the emphasis of this motion on the nationhood of Australia and ‘the achievements of the Australian nation’ explicitly uses reconciliation as a nation-building exercise for the Australian state, further denying Indigenous sovereignties.

In 2007, following the election of a new government, prime minister Kevin Rudd made a formal apology to the Stolen Generations, in federal parliament. The repeated invocation of the words ‘we say sorry’ made this apology particularly powerful, and the apology was ‘generally well received by Indigenous and non-Indigenous peoples’ (Gunstone 2016, 308). However, the Rudd apology again refused to acknowledge the practices of removing children as genocide. As Short has noted, in this sense ‘the apology failed to describe the harm inflicted accurately and in the terms favoured by many of the victims’ (Short 2012, 299).

At the time of writing, in 2017, the recommendations from *Bringing Them Home* still have not been implemented in full. In particular, reparations have not been offered by the federal government; and the recommendations for ‘self-determination’ have not been implemented. The major political discourse in relation to Indigenous Australians and the state is focused on Constitutional amendment to ‘recognise’ Indigenous Australians in the *Constitution*. Unlike some state governments (in Victoria and South Australia), the federal government has no plans to enter into treaty negotiations with Indigenous communities. Meanwhile, attempts to ‘close the gap’ between Indigenous and non-Indigenous wellbeing indicators have stalled: in 2017, it was announced that targets to improve life expectancy and reduce infant mortality rates for Indigenous Australians would not be met (The Guardian, 2017). In these ways, structural and political harms are continuing.

### **The Possibility of Justice: Naming the Harm**

It is therefore clear that there has been a disavowal of the nature and type of harm in white Australian narratives and institutions of state, and also a disavowal of Indigenous conceptions of healing. Reconciliation, rather than being a mechanism for healing, has been employed by the state as a mechanism for the state’s legitimation - a form of ‘hijacking’ of supposedly healing mechanisms, for political motives (see Subotic [2009]). In this way, both harm and healing have been ‘whitewashed’ in Australia. There is a disjuncture between, on the one hand, reconciliation as a project; and on the other hand, reconciliation as an attribute of transitional justice discourse and practice.

Given the failures of the reconciliation movement, and the failures of state processes to adequately name the harm (let alone offer any redress), a more appropriate approach may be

transitional justice. Henry has similarly argued that transitional justice is a ‘more useful conceptual framework to examine past historical injustices in established democracies’ (Henry 2015, 205). Henry has suggested a transitional justice model for Australia based on acknowledgement of harm, reparation ‘through innovative justice mechanisms’, and an acknowledgment of ‘differing and competing political perspectives of both injustice and justice’ (Ibid).

As discussed above, transitional justice does have many potential problems. However, it is our argument that transitional justice has two particular characteristics that the reconciliation policy has not demonstrated: it centralises the role of the state, and it allows black voices to articulate the harm done and the healing that is possible. However, these are *possibilities* and not *certainities* for the use of transitional justice, and we therefore make the normative argument that these aspects be enforced in any transitional justice framework. Any such framework must be structured with Indigenous voices naming the harm they have survived, and must involve a full acknowledgment of the harm by the state. We now turn to these arguments.

First, transitional justice brings an understanding of the state having perpetrated harms on a section of its population – and that the state that is responsible for the provision of redress. The state is therefore placed as a core entity in the infliction of harm and the responsibility for healing. As Henry points out, transitional justice ‘has the potential to draw critical attention to the role and harms of the state, rather than presenting it in either neutral or beneficial terms’ (Ibid). This is a key strength of applying transitional justice literature to established democracies, because such states might otherwise refuse to acknowledge the harm they have caused, or that they can be integral to ensuring healing. As we have shown, the reconciliation movement in Australia has been criticized because it minimized the role of the state as an active participant in the reconciliation process. Transitional justice, however, emphasizes the state and its responsibility – while at the same time, transitional justice permits the voices of victims to have an integral part in naming the harm and conceptualizing the healing. Although the state is highlighted, it is not the sole focus of transitional justice.

Secondly, just as race has operated as a factor in the infliction of harm, race can also be central to practices of healing. In particular, race is an important aspect of why the reconciliation movement in Australia has been limited, and why transitional justice could be a more appropriate model for addressing historical and ongoing injustices inflicted on Indigenous peoples by the state. In particular, transitional justice may be able to centralize black voices in articulating the harm and healing, and thus to support Indigenous conceptions of justice. As Kieran McAvoy and Lorna McGregor have argued, communities must have input into transitional justice mechanisms appropriate for their community: this is transitional justice ‘from below’ (McAvoy and McGregor 2008). In the Australian

context, we argue that community-driven transitional justice must center an Indigenous framing of harm and healing, with Indigenous communities setting out what type of redress they want – and from whom. The over two hundred separate Indigenous communities in Australia may have different experiences of harm, and different expectations of what constitutes healing. Understanding this multiplicity must be a first step in any transitional justice framework for Australia. There are, however, some apparent commonalities between Indigenous communities, and these form a useful place to start an examination of what transitional justice might look like. It follows from what we have set out above that it is necessary to have an act of acknowledgment of the responsibility for, and the scale of, the harm done. Acknowledgment is the opposite of the denial we have outlined above. Such denial has only served to further reinforce the harm: to refuse to acknowledge the stories of harm, or to minimize the scale of the harm, is fundamentally re-traumatizing.

While both the *Bringing Them Home* report and the apology to the Stolen Generations can be understood as moments of transitional justice (see Henry [2015]; Balint, Evans and McMillan [2014]) and indeed as moments of acknowledgment of harm, these moments have been piecemeal and have not been undertaken as part of a transitional justice framework. They have not definitively named the violence as genocide. Moreover, they also both address just one aspect of violence – the removal of children from their families – while other violence has gone unacknowledged. Future transitional justice mechanisms should address the multiplicities of harm inflicted on Indigenous peoples, in a holistic manner. Such mechanisms should also consider the continued structural injustices inflicted by the settler-colonial state. Both the harms inflicted by Great Britain (and its colonies), and by the state of Australia, should be considered. This is not a small project, and if the history we have set out above is any guide, it may prove to be politically unpalatable to white Australia. Nonetheless, it is a crucial project if Australia is to account for its historical injustices.

Arguably, the closest that Australia has come to such a moment of acknowledgment of the harm inflicted on Indigenous peoples was the then-Prime Minister Paul Keating's 'Redfern' speech, which acknowledged:

it begins, I think, with that act of recognition. Recognition that it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the diseases. The alcohol. We committed the murders. We took the children from their mothers. We practiced discrimination and exclusion (Keating 1992).

Keating was correct that healing must begin with a proper, complete act of recognition of harm and who was responsible for it. For this reason, the Redfern speech remains a powerful moment of and the Australian state, represented by the prime minister, acknowledging some responsibility for

past injustices. However, this speech did not go as far as constituting an apology for that harm. Keating stated that he did not believe guilt was something that white Australia should feel (ibid). Further, the Redfern speech centered the state of Australia, rather than Indigenous sovereignties, with Keating's assertion that Aboriginal Australians 'helped build this nation' (Ibid). Although the Redfern speech was an important moment of acknowledgment of harm, it is also an example of how this was done in a manner which did not engage with Indigenous wishes. This moment can be transcended.

A transitional justice framework for Australia might include a Truth and Reconciliation Commission with a mandate to address all the harm perpetrated against Indigenous Australians (not only the removal of children). This would rectify the problem that the National Inquiry into the Stolen Generations only focused on one aspect of harm, rather than the other complex patterns of violence that were committed as part of settler-colonialism, but that have never been fully investigated as part of a Commission of Inquiry. Further, full reparations for the Stolen Generations, and reparations for other forms of harm, should also be implemented. Finally, a new legal relationship between the state and Indigenous peoples, which recognizes the sovereignty of those peoples – a treaty – should be negotiated. In this way, transitional justice would be undertaken in a way that prioritises Indigenous sovereignties. This would be fundamentally different from the reconciliation policy, which denied Indigenous sovereignties. This, then, is a political implication of allowing black voices in the construction of healing, and of placing the state at the centre of questions of redress. However, all these mechanisms must be conceptualized and undertaken in a way that allows Indigenous peoples to name the healing processes that are most meaningful.

## **Conclusion**

The Australian state has denied the harms committed against Indigenous peoples, and at the basis of this denial has been race. White Australian institutions of state have actively created a narrative that has denied responsibility for harm, and white Australian institutions of law and state have further reinforced this narrative through denying to name the harm done as genocide. Finally, reconciliation policies have been driven by white Australian institutions of politics, in order to bolster their own position and deny Indigenous understandings of harm, healing, and sovereignty. In light of all this, we call for a renewed framework, based in a transitional justice conceptual model, to better align Indigenous and non-Indigenous ways of relating.

We have demonstrated that although transitional justice has not traditionally been associated with established democracies, increasingly it is understood that that transitional justice is necessary in states – including democracies – that have systemic wrongdoings embedded in state policy. This



has been the case in settler-colonial states such as Australia, but the application of transitional justice to Australia is only now emerging. Without a treaty framework, the Australian story is different from that of other established democracies that have started to employ transitional justice frameworks for understanding the relationship between the settler-colonial state and Indigenous peoples. The Australian context necessitates its own examination of how transitional justice can be operationalized. In addition, the Australian state is now a party to the *United Nations Declaration on the Rights of Indigenous Peoples*, which – in the absence of a treaty with Indigenous peoples – is the main mechanism for Indigenous peoples to seek justice. This *Declaration* requires states to provide effective redress for acts of harm (article 8(2)). In light of this obligation in the *Declaration* – and the emergent scholarship that properly situates transitional justice within established democracies – now is an appropriate moment to use transitional justice frames to understand the relationship between white history and black sovereignty. As we have argued, in order to actually encourage improved justice outcomes for Indigenous Australians, a model of transitional justice for Australia must prioritize Indigenous understandings of harm and healing, in order to ensure that the state undertakes an appropriate acknowledgment of harms caused and the continuing existence of Indigenous sovereignties.

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#### ENDNOTES

<sup>i</sup> Similarly, in New Zealand a treaty governs the relationship between the state and Indigenous peoples. The literature on transitional justice in New Zealand (see Winter [2014]) is of some assistance, but not precisely on point for Australia.

<sup>ii</sup> Other relevant international human rights documents include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on the Elimination of all forms of Racial Discrimination.

<sup>iii</sup> When we discuss a 'political discourse' as being problematic in this article, we are referring particularly to the way that the reconciliation policy of the Australian state has been undertaken in a political mode - involving the legitimizing of state behavior, rather than a mode of atonement. We do not mean to suggest that all politics are inherently negative; indeed, it is also a political act to engage in transitional justice.